JD(NY)-49-15
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

CARNEGIE LINEN SERVICES, INC.

and Case No. 02-CA-039560

LAUNDRY, DISTRIBUTION, AND FOOD SERVICE
JOINT BOARD a/w WORKERS UNITED a/w SEIU
f/k/a LAUNDRY, DRYCLEANING AND ALLIED
WORKERS JOINT BOARD, WORKERS UNITED

Margit Reiner, Esq., for the General Counsel.

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(Starr, Gern, Davison & Rubin, P.C.),
of Roseland, New Jersey, for the Respondent.

Ira J. Katz, Esq., for the Charging Party.

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. This is a supplemental proceeding to determine the amount of backpay owed to Jose Luis Diaz. It was heard in New York, New York, on October 22, 2014, January 21, 2015, February 19, 24, and 25, 2015, and March 12, 30, and 31, 2015. In the underlying case in this matter, the Board found that Carnegie Linen Services, Inc. (Carnegie or Respondent) inflicted bodily injury upon Diaz in response to his union activities and discharged him because he assisted and joined the charging party union in this matter (the Union), and engaged in concerted activities, in violation of Section 8(a)(3) and (1) of the Act. *Carnegie Linen Services, Inc.*, 357 NLRB No. 188 (2011), enfd. Fed Appx. 7 (2d Cir. 2012). Here, the General Counsel contends that, in addition to whatever physical injuries Diaz might have suffered, he developed a psychiatric illness and demonstrates symptoms consistent with posttraumatic stress disorder (PTSD) and major depressive disorder (MDD) which preclude his return to work, and that these psychiatric illnesses were caused by Respondent's unfair labor practices. Accordingly, counsel for the General Counsel seeks a backpay remedy and order which continues until Diaz recovers from such illnesses and is able to return to gainful employment, or alternatively to his statutory retirement age under Social Security regulations, which has been calculated to be July 31, 2041, the date when Diaz is first entitled to full or unreduced Social Security retirement benefits.

Upon the entire record, and considering the briefs filed by the parties, I issue the following

## FINDINGS OF FACT

### *Chronology of events*

To better set forth the context for the parties' respective arguments; I have set forth a chronology of events. Some predate Diaz' unlawful discharge and are relied upon by Respondent in framing its contentions as to why Diaz should not be awarded the remedy sought by the General Counsel:

August 2, 2009: Diaz had a physical altercation with a coworker (Tyrone) at Respondent's facility during which he was briefly knocked unconscious. He was sent to the hospital; however after being seen he returned to work and resumed his job duties.

October 24, 2009: Diaz had a confrontation with another coworker ("Rigo") who threatened him with a knife and said he would stab him. Diaz called the police, but by the time they arrived, Rigo had disposed of the knife. Diaz remained at work.

October 28, 2009: Diaz had a confrontation with another coworker ("Pappo"). Apparently this dispute arose over whether Diaz had characterized Pappo as an informant on union activities at the facility.

November 6, 2009: Carnegie Supervisor Garlasco offered Diaz a bribe to cease his organizing efforts on behalf of the Union. Diaz refused.

November 7, 2009: The offer of a bribe was reiterated to Diaz, and he again refused. In the presence of two company supervisors, Garlasco and Nelson Astacio, Respondent's owner Gary Perlson told Diaz that his shift would be changed, and he would be, "cleaning [his] ass with [his] mouth, mother fucker, son of a bitch, stupid. Leave my company." Perlson then splashed hot coffee in Diaz' face (the foregoing, and certain relevant subsequent events are more fully set forth in the underlying case and form a basis for the unfair labor practice findings here). Diaz called the Union and called the police. When the police arrived, Perlson denied that he had discharged Diaz, and promised him time off and reimbursement for his medical expenses. Diaz then went to the hospital emergency room where he was diagnosed with first degree burns and a left corneal abrasion.

November 9, 2009: Diaz saw a physician who provided him with a note stating that he could return to work on the following day. Diaz visited the facility and gave the note to Garlasco, who told him to call Local 1964 (the union which then and presently represents the employees at the facility). Diaz called Union Representative Marcia Marchelli, who advised him to write an account of what happened. Diaz' written description of events noted especially that Perlson, "attacked me physically, throwing a large quantity of hot coffee in my face. I had done nothing wrong. Gary was angry with me for exercising my rights. That's all."

November 10, 2009: Diaz returned to work where he was told by the evening manager that Perlson did not want him in the company, that he was fired and should leave immediately.

November 12, 2009: Diaz attended a grievance meeting also attended by Perlson, Garlasco and a representative of Local 1964.

November 16, 2009: Diaz attended a campaign meeting for the Union.

November 17, 2009: Diaz attended a union rally at City Hall in lower-Manhattan.

November 23, 2009: Union chief of Staff Megan Chambers took Diaz to consult with a workers' compensation attorney.

November 26 and 27, 2009: Diaz returned to the Carnegie facility to distribute union campaign flyers to employees. They were told to leave the premises. On November 27, the police were called and the union representatives told them they were campaigning for the Union. Perlson approached Diaz and, as Diaz testified in the underlying hearing, stated:"[Y]ou didn't have enough with the coffee? Do you want more coffee?"

November 28, 2009: Diaz went to a Miron & Son facility (a Carnegie competitor) to distribute Union leaflets.

December 3, 2009: Diaz filed a criminal complaint against Perlson.

December 21, 2009, through January 11, 2010: Diaz traveled, unaccompanied, to the Dominican Republic to visit friends and family.

January 17 through 20, 2010: Diaz assisted Union organizer Marchelli and visited homes of employees to campaign for the Union with regard to an upcoming election. He met with approximately 80 workers during this period of time.

January 20, 2010: Diaz went to the Carnegie facility on that day, which was the date of the election. He also visited two coffee shops on that day with union representatives.

January 22, 2010: Diaz visited the homes of Carnegie employees to solicit witnesses in support of union objections to the election; Diaz also travelled to New Jersey to obtain a copy of the Local 1964 collective-bargaining agreement.

February 4, 2010: Diaz saw Dr. Hugo Morales, his treating psychiatrist since then, for the first time. He went with his brother (or possibly step-brother), "Manny." Diaz has since seen Dr. Morales on numerous occasions, as will be discussed below;

May 5 through 18, 2010: Diaz travelled, unaccompanied, to the Dominican Republic, to attend to matters regarding his wife's immigration status; she joined him in the United States in June 2010.

July 13, 2010: Attorneys for Diaz sign a verified response to a demand for a bill of particulars in connection with a civil action brought against Perlson. The response states, in pertinent part, "the Plaintiff's injuries are a corneal abrasion in his left eye, blurred and reduced vision in his left eye, infected lacrimal duct; headaches, pain in his left eye, emotional and psychological distress, including post-traumatic stress disorder." It further states, "The Plaintiff was incapacitated from employment for approximately 9 days."

October 2010: Diaz was found by the Workers' Compensation Board (WCB) to have a work related injury to the left eye as well as PTSD. The WCB ordered the insurance carrier to begin paying him benefits as of February 4, 2010, the first day he produced medical evidence of disability. Such payments are expected to continue until December 25, 2021. His benefits continuing to present are $230 per week.

November 2010: According to Diaz' testimony, he stopped looking for work at this time upon the advice of counsel; however, his work logs and cross-examination in response thereto indicate that his search for work may have continued to some extent from January 2010 until approximately July 2011. This will be discussed in further detail below.

January 31, 2011: Diaz testifies in the underlying unfair labor practice case in this matter. Administrative Law Judge Steven Davis noted in his decision that Diaz, "gave specific, precise testimony about an event that would certainly have made an impression on him." (ALJD at p. 7); Judge Davis further noted that [he] "carefully quoted the outrageously hostile remarks made by him by Perlson, words which undoubtedly remained in his memory. He also precisely described how Perlson took the lid off the coffee and threw its contents in his face." (ALJD p. 8).

June 21, 2011: Diaz applied for Social Security Disability benefits. The Social Security Administration issued a notice of award on August 1, 2011, concluding that Diaz became disabled under its rules on February 4, 2010, and would be entitled for benefits as of August 1, 2011, in the monthly amount of $878.

December 25, 2011, to January 9, 2012: Diaz and his wife travel to the Dominican Republic where they visit with family.

May 21, 2012: the Unemployment Insurance Board found that Diaz was ineligible for benefits he had been receiving since shortly after his discharge from Respondent.

January 3 to 14, 2013: Diaz and wife travel to the Dominican Republic where they visit with family.

February 2014: Diaz poses for a photograph taken by and in connection with an article published in the New York Daily News just prior to the inception of Perlson's criminal trial stemming from his assault of Diaz.

August 13 to 27, 2014: Diaz and wife travel to the Dominican Republic where they visit with family.

October 20, 2014: Diaz repaid a lump sum of $8710 to the Unemployment Insurance Board.

*Diaz' testimony at the instant hearing*

Under questioning from the counsel for the General Counsel, Diaz outlined his educational and work history prior to his employment at Respondent. He testified that while living in the Dominican Republic, he completed high school in 1994. He then assisted his grandfather on his farm from 1994 to 1997; and he subsequently worked in a factory in the area

of quality control from 1997 to 2001, the year he moved to the United States. While in this country, Diaz attended English classes for 1 year and has had no further education.

Diaz worked at a facility referred to as Princeton Laundry beginning in 2001, and then worked for another facility—a cap manufacturer—for 6 months in early 2005. He worked for Miron & Sons, a competitor of Respondent, from June 2005 to December 2006. He was then hired by Carnegie as a machine operator, where he initially worked the night shift from 11 p.m. to 7 a.m.

As Diaz testified (with specificity and no apparent difficulty with recollection),[1] after his discharge, he returned to the Employer's premises on 5 occasions. The first time, on November 9, was to present a medical report stating that he was able to return to work. He later reported on that day at the time he had been scheduled to work and was told that he was discharged. Later that week, he returned for a meeting with employer and Local 1964 representatives to discuss and grieve his discharge. On September 12, he returned with Union Representative Marcelli to distribute flyers to employees and he then returned on January 20, 2010, because of the election and to give support to his coworkers.

Diaz testified that he did not do any work for the Union after January 2012; but acknowledged that in February 2014. Union Representative Chambers arranged for a newspaper to take his picture for publication. He did not give an interview at the time.

As Diaz testified, his search for work began within 2 weeks after his discharge. He asked Marchelli where he could go, looked in papers such as El Diario about 3 times per week and would visit about 8 facilities per day. He searched for work within a perimeter of about 25 streets from his home.

After Diaz' wife joined him, in about June 2010, he also began internet searches for employment, about 3 to 4 times per week. He generally sought maintenance work.

As Diaz testified, his efforts to search for work resulted in no job offers.

Diaz testified that he consulted with Dr. Morales, because he visited an attorney (Neil Abramson) who said he had to see a psychiatrist. Chambers brought him to Dr. Morales' office. Diaz stated that he told Dr. Morales that he was feeling afraid, that he could not sleep, that someone was following him and he had problems because of a bad eye. Although these difficulties had first appeared in December 2009, he wanted until February 2010 because that was the first appointment he could receive. Diaz claims that he had similar symptoms to some extent prior to December 2009. He asserted that his fears began after Perlson threatened him during leafleting on November 27, 2009 (as has been described above and in the underlying ALJD).

[1] This was generally the case throughout Diaz' direct examination.

Initially, Diaz undertook his work search alone. Once his wife arrived in the United States, she would accompany him due to his fears. He did not ask others to assist because he did not want to discuss the coffee incident with them.

As Diaz testified, he stopped searching for work in November 2010. He testified in this hearing that attorney Abramson told him not to look for work, because he was preoccupied and feeling bad. Diaz also stated that he could not go out of the house because his wife was working and could not accompany him.

Pursuant to Respondent's request, counsel for the General Counsel produced a document purporting to be Diaz' work logs and he was called to the stand to offer testimony regarding the entries contained therein. As Diaz testified, he started keeping the log in January 2010 at Marchelli's suggestion because he might need it one day. As Diaz testified, the log represented the places he looked for work, the address and telephone number of the facility and the dates he conducted his work searches. His testimony reflects that he continued to search for work beginning in January 2010, at times in locations not necessarily adjacent to his home.[2] The work log reflects notations continuing until July 2011. Diaz testified that he would visit personally, telephone or look through the internet. He additionally testified that he contacted several facilities suggested by Union Representative Marchelli, which are also reflected in his log. Generally, Diaz testified that he continued to look for work, because he wanted to work. Most of the internet searches were conducted with the assistance of his wife, because he did not know much about the internet. Diaz admitted that he applied for a job with a company called Hoosier Stamping, located in Evansville, Indiana. When asked about the location he replied, "Well, my wife was helping me." When asked whether he would have gone to Indiana to accept such a job, replied that he would not, because his family here in New York. Diaz' work log reflects that on July 24, 2011, he applied to a facility referred to as Zerodraft located in Syracuse, New York. When asked whether he would have moved to Syracuse if he had gotten employment he replied that he did not know the distance. When asked how far he would have been willing to travel to employment he replied: "One hour to three by bus." On July 29, 2011, Diaz applied for a position in Loudonville, New York, located near Albany. He stated he could not say if he would have gone there for a position. Diaz testified that after July 2011, his wife continued to look for work for him, but he could not remember when she stopped. Counsel for the General Counsel asked Diaz: "Now you testified that you had stopped looking for work around November of 2010 and yet, we see there are some entries for June and July of 2011. Can you explain that? Diaz's answer was: "I felt that I wanted to do something. My body was telling me I wanted to go to work."

Diaz and his wife have two children. At the time of the hearing they were ages 4 and 1. He states that his wife and his mother provide child care.

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[2] The first entry is dated January 7, 2010; however, as counsel for the General Counsel noted, Diaz was by his own admission in Santo Domingo on that date. When asked about that, Diaz stated he had just recently returned and went to the company.

Diaz further testified that he attended a gym located about 5 minutes from his home for workouts; and that it was his own idea. He does a cardio routine and exercises for his shoulder on his doctor's advice. His typical workout lasts about 1 hour. He also attends his medical appointments and otherwise is in the house with his mother and children.

On cross-examination, Diaz stated that if he had found a job at the time he was initially searching for work, it was possible that he would still be working today. He also testified on cross-examination that he did not tell Dr. Morales that he went to airports.

Diaz visits his mother's home, which is about a 10 minute walk and his brother's residence, which is about a 15 to 20 minute walk from his apartment.

Diaz testified that did not recall whether he told Dr. Morales about his fight with Tyrone, where he became unconscious and was taken to the hospital. He stated that he did tell Dr. Shvil (an expert witness retained by Counsel for the General Counsel, whose testimony is discussed below) about it. Diaz testified that he did not tell Dr. Morales about the knife incident Rigo and did not recall whether he told Dr. Shvil. He "probably" told Dr. Morales about his confrontation with Pappo, but did not tell Dr. Shvil about it.

Diaz testified that he did not remember whether he told Dr. Morales about his search for work. He did tell him that he returned to the work site on November 10 and attended a grievance meeting on November 12. He did not tell Dr. Morales about the rally on November 17, but did inform him that he went back to Respondent on November 27 to leaflet, and told him what Perlson said to him on that day. Diaz did not tell Dr. Morales about leafleting at Miron & Son; however he stated that he did discuss his trip to the Dominican Republic, his work for the Union between January 17 and 20, 2010, the 80 employees he visited and spoke with prior to the election; the election day itself and where he went to eat with union representatives.[3] Diaz testified that he agreed with the statement in Dr. Morales' initial report that he spends most of his time at home and only goes to places where they have cameras for protection.

According to Diaz, it was "probable" that he informed Dr. Morales about his subsequent trip to the Dominican Republic in May 2012.

As Diaz testified, during his visits, Dr. Morales did not administer any written tests but asked him various questions which were always different. He did not recall whether he was shaven and stated that he dressed casually, as he typically does.[4] Their sessions lasted one hour or more and his wife accompanied him to all visits once she arrived in the United States.

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[3] These activities are not reflected in any report generated by Dr. Morales, and do not appear to have been considered by him in generating his diagnosis and prognosis.

[4] Dr. Morales' reports uniformly refer to Diaz' appearance as untidy and unshaven. This was not his appearance during the multiple dates of the hearing where he was neatly dressed and well groomed.

In about May 2010, Diaz told Dr. Morales that he was hearing voices of unknown people laughing and calling his name. He told Dr. Morales about problems with his eye, which Diaz believed was related to the coffee splashing. He also consistently told Dr. Morales that he had poor concentration and poor memory.

Diaz had a session with Dr. Morales on May 4, 2010, which was 1 day prior to a trip to the Dominican Republic. Diaz did not recall whether he told Dr. Morales about this upcoming trip and stated that he did not report it at his next appointment, in June.

Diaz did not recall whether he advised Dr. Morales about his wife's pregnancies or the birth of his children. He stated that he probably told Dr. Morales that he had lost his father at a young age, and his grandfather was like a father to him.

Diaz saw Dr. Shvil in January 2015. His step brother, Manny, accompanied him. The evaluation took about 2 hours. He did not recall what he told Dr. Shvil about hallucinations, but did tell him he was hearing voices. He did not recall telling Dr. Shvil about the events immediately following the coffee splashing such as the grievance meeting, leaflet distribution, the rally at City Hall, visiting coworkers' homes, his other work for the Union prior to the election, or the criminal trial against Perlson.

*Diaz applies for Unemployment Insurance benefits*

Two weeks after his discharge, Diaz applied for unemployment insurance benefits. Although he initially was granted such benefits, the Department of Labor subsequently found that Diaz was ineligible to receive such benefits on the basis that he was not capable of work and charged him for an overpayment. Diaz contacted Union Representative Chambers, who advised him to file an appeal, which he did, and maintained for a substantial period of time. Thereafter, on May 21, 2012, the Unemployment Insurance Appeal Board issued a determination finding that Diaz was liable for the overpayment, but that he was without fault because he wanted to work and had applied for employment until November 23, 2010, when, upon the advice of his workers' compensation attorney, he informed the Department of Labor that he was unable to work. As noted above, in October 2014, Diaz repaid a sum of $8710 to the Department of Labor.

*The Workers' Compensation Board determination*

On October 20, 2010, Diaz was found by the WCB to have a work-related injury to his left eye as well as PTSD. The WCB directed the insurance carrier to begin paying him benefits as of February 4, 2010, the date on which he first produced medical evidence of disability. Diaz was also referred to the bureau's rehabilitation unit. A vocational rehabilitation counselor interviewed Diaz, with his step-brother serving as interpreter and issued a report finding that Diaz was not a candidate for vocational rehabilitation at that time. Diaz' disability was initially characterized as a temporary partial disability. On April 25, 2014, the WCB found Diaz to be permanently partially disabled and entitled to continuing payments for 400 weeks.

*Diaz's submission to the Social Security Administration and associated records*

As noted above, on or about June 21, 2011, Diaz completed, signed, and submitted an application for disability benefits to the Social Security Administration, was found to be disabled as of February 4, 2010, and began receiving such benefits in about August 2011. Diaz was awarded such benefits due to a diagnosis of PTSD, meeting a listing under Social Security regulation 12.06AB and resulting in several marked restrictions in his psychiatric residual functional capacity assessment. There are various components to this application which include records from Dr. Morales, records from other health care providers and Diaz' personal statement regarding his medical condition which led him to apply for benefits. I will address the latter statement here, and other portions of Diaz' medical records below.

As an initial matter, it should be noted that throughout the hearing in the instant matter Diaz presented, and it was generally acknowledged, that he had limited facility in English.[5] He testified quite clearly that his wife assisted him in completing his portion of the application which is in English and includes a question and answer section relating to his ability to function physically and emotionally as regards the requirements of work and more generally in terms of daily activities of living. I further note, however, that Disability Examiner Ken Poletto made a file note of a conversation which he had with Diaz' step-bother, Manuel Perez, who contacted him and according to Polleto's note, the SSA received the following information:

> He proceeded to tell me that since the claimant experienced this traumatic event at his work place where his boss threw a cup of hot coffee in his face/tried to pay him off/and fired him, he has not been the same person. The union he had through his work didn't help him either and he was tired of working long hours and whatever shift they made him work, he tried to get other workers together to go to the union as a group and his boss retaliated. He locks himself in his bedroom and looks out the window in fear that his boss will come after him after he gets out of jail for assault. His wife found the ADL paperwork that the claimant hid in a dresser drawer due to fear after he saw his employer's name on the paperwork. His step-brother said that the claimant used to enjoy all kinds of sports, family gatherings, and doing things outside and now he just takes his medicine, his wife helps him wash up, and then he always goes in his bedroom and locks the door in fear. He always looks out the window in fear that someone will get him. He went to the store with his family shortly after the incident and he saw a stranger with a cup of coffee and he grabbed it and threw it across the room. The owner of the store didn't press charges because he knew the family and they explained what is going on, his step-brother has to travel 2 hours to come and help with him with all these appointments. Claimant and his wife both are Spanish speaking only and have a difficult time with all of what is going on. His step-brother said that the whole family has been affected by this as he is so different than the man he used to be.

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[5] Diaz not only testified with the aid of an interpreter, but one was made available by counsel for the General Counsel to assist him throughout these proceedings.

Thus, this note, made by an representative of the SSA, which purports to reflect his discussions with a relative of Diaz, as his stated representative, calls into question (at the very least) whether Diaz' wife would have, in fact, been proficient enough in English to be able to adequately assist him in completing the narrative portion of his application. In any event, Diaz adopted the statements contained therein, and signed and attested to the truthfulness of his application. There is no evidence he was unaware of or misled as to the nature of its contents.

In general, it must be said that, Diaz presented himself as someone who was far less than functional in terms of daily activities. Moreover, it does not appear to me that someone with limited facility in English would have been able to assist Diaz and fashion certain of the following responses.

For example, when asked to describe his household chores and yard work, Diaz responded: "Always see him with a hot cup of coffee looking for me. He wants to kill me. My work is keeping him away from me."

Numerous other responses reflect Diaz' preoccupation with the notion that Perlson is out to harm him and its repercussions are that he, "can't sleep any more, always moody, depressed and unable to do this I use to do before…always fearful of it. I have panic attacks, fear of going outside." Diaz continued to explain that he only went outside to see his "attending physician, see my lawyer, all appointments I have, the only time I go out. The rest of my time I spend locked in my room."

Diaz reiterated that he spent much of his days locked in his room. For example, when asked how often he socialized with others he responded: "When I have to only. I just want to be alone, no one to harm me if I am locked in my room."

When asked about what he does to deal with anxiety, Diaz again responded: "I talk to my wife and my family. I request to see my psychiatric Morales and I lock myself in my room."

When asked how stress or changes in his schedule affected him he replies, "I don't like changes in my life or schedule. I like to be locked in my room."

Diaz further stated that he was "unable to travel or go anywhere by myself."

In Section 3, entitled "Remarks," Diaz attested as follows:

> I never suffered from any health conditions. All these psychiatric issues that I am now facing are due to the physical assault when Gary, the owner of Carnegie Linen Services where I worked for approximately three years. Now I am totally disabled. Although I am under psychiatric treatment for two years and a half, I do not demonstrate any indicator of improvement with the proper professional psychiatric care. I am always complained of poor memory, poor concentration, insomnia, flashbacks, nightmares, auditory hallucinations, fears and somatic manifestations.

In this regard, Diaz stated that he was, "unable to hear clearly [and that] sometimes I hear voices and people laughing [at] me."

He is unable to use his hands because, "I have the perception that hot coffee is going to burn my face."

Diaz further stated that he depended on his wife to shop and help him shave, feed himself, clean himself after using the toilet, prepare his food and take his medication, among other things.

In terms of the physical effects of the assault, Diaz (or his representative) wrote that he has a "visual disturbance, discomfort and dryness. I have to wear glasses. I lost the vision on my left eye due to the assault."[6] Diaz further stated that he is unable to travel independently and that the "fatigue and anxiety never go way due to the ripple effects of the physical assault."

*Diaz' Medical Treatments*

*Segundo Ruiz Belvis Diagnostic and Treatment Center*

At all relevant times, Diaz received his general medical care from the Segundo Ruiz Belvis Diagnostic and Treatment Center, where he received physical examinations and medical testing, medication and treatment for diabetes and other ailments. He also was seen by Marie Greene, an optometrist, who examined him on several occasions after the so-called "coffee splash" incident.[7]

On November 25, 2009, Dr. Greene conducted an examination of Diaz based upon complaints of pain in or around his eye and a superficial injury of the cornea. Dr. Greene's assessment was that the abrasion of the cornea was clinically resolved and that Diaz's subjective complaints did not match the symptoms presented. At this time his vision without glasses was measured to be 20/25 in both the left and right eyes, as it was on several subsequent visits. On December 3, 2009, Diaz returned to see Dr. Greene and complained of redness, tearing and irritation in his left eye. It was noted that he had gone to court that morning to report the incident. He was found to have a superficial injury of the cornea. The diagnosis was "subjective visual disturbance, unspecified OS [left eye]." Again, Dr. Greene noted that the symptoms complained of did not match the clinical presentation. In other notes, dated December 4 and 11, 2009, Dr. Greene again found a "subjective visual disturbance, unspecified OS." On December 11, Diaz' vision tested without glasses was found to be 20/20 in both eyes. On January 26, 2010, Diaz' vision was again tested and found to be 20/30 in his left eye and 20/20 in his right eye. The optometrist found: "subjective visual disturbance, unspecified pseuomenganous conjunctivitis OS." Dr. Green noted: "concerns of purposeful irritation of eye by pt. in light of pending lawsuit." Diaz was advised to avoid manipulating his eye and prescribed a medication referred to as Tobradex to take for 1 week.

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[6] During the course of the hearing, which extended over a number of days, I failed to observe any occasion on which Diaz required the use of corrective lenses for either near or distance vision.

[7] That is how it is referred to in the relevant medical files.

On March 25, 2010, it was noted that "Pt. presents with white coating on eyelid. Reports still using antibiotic ointment prescribed by ER doctor when presented to 'coffee splash' incident." Dr. Green added, "Note that pt. was observed by doctor in waiting when he presented for dental apt 3/22/10 with no abnormalities to eye. Often discrepancy with clinical presentation and sxs. Concerns about malingering in light of pending workman's comp case." At this visit, Diaz was advised to use lubricants for his eye.

On July 1, 2010, Diaz was seen by Dr. Kirti Shah for an assessment of his diabetes. He had not been taking his insulin, as directed, and the doctor noted, "once again, pt. was educated in self administration of insulin and dose of Lantus, to keep record and bring on next visit."

On September 3, 2010, Diaz was again seen by Dr. Greene who reported: "Ohx: coffee splash accident, taken to LHC ER and first eval by LHC eye clinic. Suspected h/o malingering and atypical presentations of lid swellings." Diaz was found to have acute conjunctivitis of the left eye. It was further noted, "Questionable pt. induced. No evidence of sequelae of coffee splash incidence. He was prescribed maxitrol for 1 week." On Friday September 10, Diaz reported improvement with the use of drops and washing his face. And the conjunctivitis of the left eye was found to be resolved.

On September 22, 2010, Diaz attended a medical appointment with a nurse practitioner who noted Diaz, "has hx of depression being followed at outside MH clinic & is on lexapro and trazodone but is having financial & family problems with some exacerbation. No change in med doses since Feb 2010; occ feelings he would be better off not here but no active suicidality. Insomnia."

On April 4, 2011, Dr. Greene examined Diaz again. His vision was 20/25 in both eyes without glasses. Dr. Greene noted: "Seeking original care/second opinion from LHC. As seen there post 'coffee splash injury,' all clinical exams variable, inconsistent. r/o malingering."

On April 6, 2011, Diaz was seen and treated because of painful toenails resulting in difficulty in ambulation. At another podiatry visit, conducted April 20, 2012, Diaz was subjected to a "risk screening" where he was found to have neither anhedonia nor a depressed mood (it is not clear from the clinical note whether this was the evaluator's opinion or Diaz' self-reporting). He was again seen and treated for painful toenails and other difficulties with his feet on April 20, 2012. On August 21, 2012, there were again negative findings with regard to anhedonia and depressed mood, although he was given a secondary diagnosis of "Depressive disorder, not elsewhere classified—being treated at outside facility." Diaz had another podiatry visit on September 7, 2012, where he complained of painful toenails bilaterally, having difficulty wearing shoes and a history of pain on ambulation.

At a medical visit December 7, 2012, Diaz was found to have as a secondary diagnosis: "Depressive disorder, not elsewhere classified—being treated at outside facility." To help manage his diabetes, Diaz was told to follow nutritional instructions, to check his feet daily and walk for 30 minutes 4 days per week. In what appears to be his next visit to the clinic, Diaz reported that he had been going to the gym and feels much better. On March 29, 2013, it was again recommended that Diaz walk 30 minutes per day on 4 days per week.

On July 30, 2013, the following note was made. “Patient with hyperlipidemia, Dm, PTSD goes to a psychiatrist. Feels well. Diabetes is better.” Diaz was again advised to walk for 30 minutes 4 times per week. On August 2, 2013, Diaz reported that he has no complaints and has begun an exercise program. On September 20, 2013, Diaz was found to have 20/20 vision without glasses in both eyes. On November 19, 2013, questions relating to anhedonia and depressed mood produced negative results, he was instructed to walk for 30 minutes 4 days per week, and it was noted that Diaz goes to a psychiatrist. The negative results regarding anhedonia and depressed mood were reiterated in an examination conducted on April 3, 2014; however, it was noted that Diaz goes to a psychiatrist for depression and takes Lexapro and Trazodone. On October 1, 2014, it was noted that Diaz had a “depressive disorder, not elsewhere classified—being treated at outside facility.”

Throughout the period of his treatment at Segundo Ruiz Belvis, in numerous medical notes, Diaz was assessed as a patient who did not demonstrate learning barriers, understood verbal information and written materials, and demonstrated adequate understanding relating to medication, its proper dosage and frequency, the reasons for taking the prescribed medications and their possible side effects. He was instructed as to how to self-administer insulin injections but as not always compliant in following medical instructions regarding how to control his diabetes through weight control, diet and exercise.

*Metropolitan Hospital Center Records*

On March 1, 2012, Diaz went to the Metropolitan Hospital Center, where he was seen by a physician in the Arthritis Rheumatology department. He was described as having shoulder pain for 1 year. He was seen again on March 30 and diagnosed with myalgia myositis, disorders of the bursae and tendons in the shoulder region. On that visit Diaz attributed his symptomology to overuse of the left upper extremity in his work; and told the physician that the pain had begun 4 years previously. It was also noted that Diaz maintained good eye contact and was not in distress. He was given trigger point injections of Lidocaine and reported immediate relief. He was also advised to engage in home exercises.

On April 13, 2012, when Diaz was seen for a physical therapy evaluation, it was noted that he reported that he was on disability, and was independent with respect to his activities of daily living. He was found to “verbalize adequate understanding regarding treatment plan and goals. . . ” He was seen again for physical therapy on April 19, 2012, when he performed various exercised prescribed for him by the physical therapist. Sessions followed on May 3, 11–12, June 8, 15, and 30 at which time he was discharged from physical therapy. Throughout these sessions it was noted that Diaz demonstrated adequate understanding relating to his therapy and the instructions provided by his health care providers.

*Diaz’ Psychiatric Treatment and Other Evaluations*

*DSM Criteria for PTSD*

Both Dr. Morales and Dr. Shvil (whose report and corresponding testimony is discussed below) referred to the Diagnostic and Statistical Manual Section 309.81 in evaluating Diaz. Dr. Nassar, the Respondent’s expert witness, expressed skepticism about the framework of this

diagnostic measure. The most recent version is known as the DSM 5, although certain of Diaz's evaluations were pursuant to an earlier version (the DSM IV).

The diagnostic criteria identify the trigger to PTDS to be violence in one (or more) of the following ways:

> Exposure to actual or threatened death, serious injury or sexual violation. The exposure must result from one or more of the following scenarios, in which the individual:
>
> Directly experiences the traumatic event;
>
> Witnesses the traumatic event in person;
>
> Learns that the traumatic event occurred to a close family member or close friend (with the actual or threatened death being either violent or accidental); or
>
> Experiences first-hand or extreme exposure to adverse details of the traumatic event (not through media, pictures, television or movies unless work related.)
>
> The disturbance, regardless of its trigger, causes clinically significant distress or impairment in the individual's social interactions, capacity to work or other important areas of functioning. It is not the psychological result of another medical condition, medication, drugs or alcohol.

The foregoing is referred to in the DSM as "Criterion A."

Criterion B for diagnosing PTSD is having one or more intrusive symptoms associated with the traumatic event beginning after it occurred such as recurrent, involuntary and intrusive distressing memories of the traumatic event; recurrent distressing dreams in which the content and/or affect of the dream are related to the traumatic event(s); dissociative episodes (e.g. flashbacks) in which the individual feels or acts as if the traumatic event(s) were reoccurring; and intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).

Criterion C refers to persistent avoidance of stimuli associated with the traumatic event(s), beginning after they occurred evidenced by avoidance or efforts to avoid distressing memories, thoughts or feelings about or associated with the traumatic event(s) and avoidance of external reminders that arouse distressing memories thoughts or feelings (such as people, places, conversations, activities, objects or situations) of the traumatic events.

Criterion D relates to negative alterations in cognitions and mood associated with the traumatic event(s) beginning or worsening after occurrence as evidenced by two or more of the following: inability to remember an important aspect of the event(s); persistent and exaggerated negative beliefs or expectations about oneself, others or the world; persistent, distorted cognitions about the cause or consequences of the event(s); persistent negative emotional state; markedly diminished interest or participation in significant activities; feelings of detachment or estrangement from others; and persistent inability to experience positive emotions.

Criterion E regards alterations in arousal and reactivity associated with the traumatic event(s) beginning or worsening after the event including irritable behavior, angry outbursts, reckless or self-destructive behavior, hypervigilence, being easily startled, experiencing difficulties with concentration, and sleep disturbances.

As is relevant to Diaz' activities after the events of November 7, 2009, the DSM notes that: "Symptoms usually begin within the first 3 months after the trauma, although there may be a delay of months, or even years, before criteria for the diagnosis are met." This was generally concurred with (although with some qualification as expressed by Dr. Nassar, explained below), by the medical professionals who testified at the hearing.

*The Testimony of Dr. Morales*

As his curriculum vitae and testimony reflect, Dr. Morales has practiced psychiatry since 1957. He is a Distinguished Life Fellow of the American Psychiatric Association, and is a Diplomate of the American Board of Forensic Medicine, the American Board of Psychology and Neurology and the American Board of Quality Assurance and Legalization Review Physician. He has testified as an expert witnesses in various courts and, most frequently, before the Workers' Compensation Board. This is not, however, the primary source of his income.

As Dr. Morales testified, he currently treats hundreds of patients, about 30 to 40 percent of whom have been diagnosed with PTSD. As noted above, he has been Diaz' treating psychiatrist for years, and has consistently submitted reports of his evaluation of Diaz' condition to the Workers' Compensation Board. Such records were also submitted in support of Diaz' application for Social Security Disability benefits.

Dr. Morales first saw Diaz on February 4, 2010. As he testified, Dr. Morales evaluated Diaz' demeanor, heard his chief complaints, took a history, evaluated his premorbid personality and psychiatric history and assessed his functioning in terms of daily activities. He then rendered a diagnosis and prognosis.

Dr. Morales testified that, in Diaz' case, his premorbid personality was that of an active and hard working person, who had an active social life and had never suffered from any physical or mental incapacity. He further testified that when Gary Perlson attacked Diaz, he was humiliated.

According to Dr. Morales, Diaz told him that he felt useless, helpless, and afraid that his life was in danger right after this trauma. He complained of symptoms of insomnia, nightmares, flashbacks, and an inability to sleep. He further complained of being agitated, irritable, and afraid that Perlson would hurt him again or send someone to kill him. In addition, as Dr. Morales testified, Diaz presented as depressed, apathetic, and anhedonic, i.e. he lost the capacity to enjoy activities he used to enjoy.

Dr. Morales opined with a reasonable degree of medical certainty that Diaz was suffering from classic symptoms of PTSD, associated with major depressive disorder (MDD), both causally elated to the events of November 7, 2009. Dr. Morales concluded the issue of causality was based upon the fact that Diaz had no psychiatric problems prior to the date of the incident

in question and had been able to work without difficulty. Dr. Morales determined that Diaz was unable to work because of:

> Suspiciousness that he's going to be hurt. Feeling what we call a paranoid tendency that unknown people would follow him and he might be hurt. Also, some hallucinations, insomnia, nightmare, frustration, irritability, panic manifestation, all of these symptoms will disable him or anybody suffering from that.

Dr. Morales initially found Diaz to be temporarily disabled, but by May 2010, he changed his opinion and concluded that Diaz was permanently totally disabled. At this time, Dr. Morales opined and wrote in his report that Diaz had a "severe psychotic condition;" however, he testified at the hearing that Diaz was not psychotic.

Regarding Diaz' search for work, Dr. Morales testified that it was not inconsistent with a diagnosis of PTSD for Diaz to have continued attempting to search for work during the 1st year of his disability. As Dr. Morales testified, he counseled Diaz to be active, but that either his depression or the prescribed medication was sapping his energy. In this regard, Dr. Morales testified that he encouraged Diaz to look for work "to be active" and because it "will increase their confidence and self-esteem, I would want them to do this, to go out and do things." He did not, however, refer Diaz to vocational rehabilitation because it may "increase the feeling for uselessness and helplessness."

According to the record, Dr. Morales last saw Diaz in January 2015 and testified that his opinion on the causal relationship of his disability and his diagnosis of Diaz' condition has not changed.

On cross-examination, Dr. Morales testified as follows regarding his application of the DSM PTSD criteria as applied to Diaz:

> Q: (by Respondent's counsel): As I read 309.81 which is a code that you cite to in your report, the first element that a patient needs to meet for a diagnosis of post-traumatic stress disorder is exposure to actual or threatened death, serious injury or sexual violence. Is that correct, do we agree?
>
> A: (by Dr. Morales): correct
>
> Q: Okay. There are other ways that a patient can meet that criteria, correct?
>
> A: Other ways, No.
>
> Q: Let me – As I read the DSM criteria relative to post traumatic stress disorder, you can meet that criteria by directly experiencing it, by experiencing the event, correct?
>
> A: Correct.
>
> Q: And, also, if a person learns that a loved one or a friend was exposed to actual or threatened death, serious injury or sexual violence, they can meet that criteria.
>
> A: Correct

Q: And so, in addition to a person actually experiencing exposure to a threat of death or serious injury or sexual violence, if a loved one is in the area and sees those events happen to a loved one, they can also meet the criteria, right?

A: correct

Q: And, I believe and correct me if I'm wrong, I just want to be clear, according to the way you testified in this case, it's your opinion that if a person subjectively perceives a threat of injury as severe, they can meet that criteria –

A: Correct.

Q: Okay, Is that – Is that issue of perception anywhere codified in the 309.81 of the DSM criteria for diagnosis?

A: I don't know if it's in there or not, but it's standard in psychiatry, perception is the most important thing.

Q: But you don't know – Can you point me to either in the DSM 5 or in the practice guidelines for treating a patient with acute stress disorder and post-traumatic stress disorder, where it says that the requirement of experiencing a threat of death or serious injury is subjective in nature?

A: Well, you see there is the stressor, the stressor traumatic event indicating how severe it should be for you to develop PTSD. Also, remember, this is the guideline, they are not specific that it has to be that way, they are guidelines.

Q: Okay, Is it -- Is it also your opinion if a person is in the vicinity where a loved one is and they see a loved one, you know, exposed to an injury that if their loved one subjectively perceives something as dangerous and they find that out that's enough to meet the first criteria, the DSM criteria.

A: It is. Yes.

*Respondent's contentions regarding Dr. Morales' testimony*

Respondent argues that the evidence establishes that, in assessing Diaz' premorbid personality, Dr. Morales did not inquire, Diaz did not volunteer and therefore Dr. Morales failed to consider, various other potentially traumatic events Diaz had experienced. Respondent further argues that Dr. Morales failed to consider Diaz' activities shortly prior to his diagnosis of PTSD and MDD such as travelling independently to the Dominican Republic, returning to the Employer's facility at the time of the election, on January 20, 2010, otherwise campaigning for the Union and assisting the Union in finding employees to support its objections to the election.

Respondent additionally points to what it contends are instances of inconsistent testimony relating to the cause of Diaz' fatigue; the extent to which his vision was compromised;[8] whether Diaz could have continued to work had he found a job within the year and whether Diaz' immediately bringing up the coffee incident in conversation was consistent with symptomology of PTSD. Similarly, although Dr. Morales had observed that Diaz's memory is intact, he consistently noted subjective complaints of poor memory and concentration.

Dr. Morales admitted that he took handwritten notes of his interview of Diaz only upon their initial meeting. Thus, the record fails to contain contemporaneous notes of their sessions or to establish or otherwise corroborate the assertions set forth in the various reports contained in the record.

In this regard, as Respondent notes, on several occasions, Dr. Morales wrote in his reports that it was Diaz' right eye rather than his left eye which was injured. Dr. Morales did not review any of Diaz' medical records prior to reaching a diagnosis, despite his admission that such medical records can be a helpful source of "collateral information" in the evaluation of PTSD. While Dr. Morales testified that he gave Diaz the recognized objective test of remembering three words; there is no mention of this in his reports. Dr. Morales was apparently unaware that immediately prior to visiting him for the first time, Diaz visited the Dominican Republic and travelled unaccompanied; he was also apparently unaware of the difficulties Diaz with several of his coworkers in the months prior to his discharge.

In short, Respondent argues that Dr. Morales' opinion was based upon an improper subjective test, relying upon the limited and self-serving information provided by Diaz without benefit of review of any medical records and that his reports evince numerous internal inconsistencies and reflected an evaluation of PTSD symptomology which unduly relies upon subjectivity rather than medical evidence. Accordingly, Respondent argues the diagnosis and opinion of Dr. Morales should be rejected.

*Dr. Shvil's Evaluation of Diaz and Related Testimony*

In support of its theory of ongoing backpay liability, counsel for the General Counsel arranged for Diaz to be evaluated by Dr. Erel Shvil, a clinical psychologist with a specialty in PTSD. Dr. Shvil was asked to determine whether Diaz suffers from PTSD; whether the PTSD is a result of the unfair labor practices in this case and whether Diaz's medical condition currently prevents him from returning to work.

*Dr. Shvil's background*

As Dr. Shvil testified, his interest in this area began when he served in the Israeli Defense Forces and saw individuals who were exposed to trauma in war zone situations. He

[8] As Respondent notes, Dr. Morales testified that Diaz told him that he had "lost most of the vision in his eyes" but then stated that Diaz suffered only from "blurred vision."

thereafter earned two masters degrees and a Ph.D. from Teachers College, Columbia University in clinical psychology.

As part of the requirement for getting his Ph.D., Dr. Shvil treated and evaluated patients at the Columbia University out-patient clinic, and later served a clinical internship as a psychologist at Jacobi Medical Center, affiliated with Yeshiva University's Albert Einstein College of Medicine, treating persons suffering from PTSD as result of civilian trauma such as domestic abuse, gang violence and similar kinds of events. Dr. Shvil also worked as an assistant in the Teachers College Department of Clinical Psychology and as an adjunct professor of psychology in both the undergraduate and graduate schools of Pace University.

After receiving his Ph.D. in 2011, Dr. Shvil completed his postdoctoral work and became a licensed clinical psychologist and began teaching in the Teachers College Department of Psychology.

Dr. Shvil has received two postdoctoral fellowship grants, the first working under the mentorship of Yuval Neria, a world renowned expert in PTSD who was recruited by Columbia University after 9/11 due to his expertise in trauma and PTSD. The second fellowship, still extant, was awarded to him by the National Institutes of Mental Health.

The substance of Dr. Shvil's work is in studying the biomarkers of PTSD in the brain and assessing the impact of new treatments for this disorder. The subjects of this study are individuals who either have PTSD or were exposed to trauma but did not become ill. Dr. Shvil testified that he acts as a "gatekeeper" of the study, i.e. he determines whether potential subjects have PTSD and if so, the level of severity they exhibit. He also supervises the research of assistants who perform initial screenings for the study.

Dr. Shvil testified that over the course of his fellowships he has evaluated over 300 patients. He has treated about 25 patients who suffer from this disorder. For the past 4 years, Dr. Shvil has maintained a private practice where he treats from 13 to 15 patients at any one time. At the time of the hearing, he had 13 patients in private practice, 7 of whom suffer from PTSD.

Dr. Shvil also serves as a reviewer for peer reviewed journals, and has contributed articles to journals, six of which deal with PTSD. He has also spoken about his research at various professional conferences.

*Dr. Shvil's examination of Diaz*

According to Dr. Shvil's report (entitled Psychological Evaluation), he was referred by the General Counsel to assess (1) whether Diaz is diagnosable as having PTSD; (2) to determine whether his mental condition is the result of the unfair labor practices he experienced (referred to as "the event" in his report); (3) the degree of Diaz' disability; and (4) whether his current mental condition renders him unable to work.

Dr. Shvil utilized the services of a professional interpreter hired by the Board. In addition, an individual referred to as Diaz' "brother" accompanied Diaz throughout the evaluation, as Diaz

stated that he felt "too timid" without him; stating that he went with his brother everywhere when he is out of the house.

Dr. Shvil observed that at the initiation of the interview, Diaz appeared startled and behaved anxiously, pointing to a coffee mug on Dr. Shvil's desk. It was only after Diaz was reassured that it was empty that he relaxed.

Dr. Shvil observed that throughout the interview, Diaz maintained good eye contact and normal thought process. However, he also evidenced anxiety demonstrated by shaky hands, dry mouth and darting eyes. He demonstrated an affect described as "labile" in that he began crying and shaking at several points throughout the interview; and required breaks to calm down before he was able to continue.

When interviewed by Dr. Shvil, Diaz denied having any auditory or visual hallucinations; and did not appear to be suicidal.

In the history recounted to Dr. Shvil, Diaz discussed the fact that he was born and raised in the Dominican Republic, that his father passed away when he was very young, and his mother moved to the United States during his early adolescence. Diaz grew up at his grandparent's house with his younger brother. He worked on his grandfather's farm and completed high school. He then performed work in a factory until 2001.

In 2001, at the age of 27, Diaz moved to the U.S. and reunited with his mother. He met his half-brother and half-sister. He had a series of jobs in the laundry industry, and eventually found work with the Respondent where he remained employed for approximately 3 years.

Diaz reported that he was socially active, played outdoor sports and went to movies or parties. Once per year he visited relatives in the Dominican Republic. He met his current wife and they married in the Dominican Republic in 2009. At the time of his interview with Dr. Shvil, Diaz reported he had two daughters: one aged 3 and the other 8 months old.

Diaz told Dr. Shvil that his work at Carnegie was "hard but satisfying." He stated that he maintained good terms with the owner and the other supervisors, Nelson and Garlasco. He became one of the more senior employees and felt that his employer trusted him to ensure that things worked well.

Many of the newer employees were immigrants and "did not know their rights." Diaz felt that the union that represented the employees at the time did not do enough to help the workers and he and a group of others began organizing.

Diaz reported that on November 7, 2009, a meeting which was scheduled to be held in a nearby restaurant did not take place, because Garlasco found out and appeared at the restaurant. The meeting was postponed.

As Diaz recounted to Dr. Shvil, on the following day, he was called into Garlasco's office. Garlasco asked him to stop his organizing efforts and offered him $3000 to do so. Diaz reported that it was too late, and he had already spoken to the workers. When he left the building he was summoned by Nelson to return to the facility where he encountered Perlson. Nelson and

Garlasco were also present. Perlson spoke with him while Garlasco translated their discussion. It was at this time that Perlson related the offensive and profane comments which have been reported above and then threw coffee into Diaz' face. Diaz told Dr. Shvil that, at this point, Perlson told Diaz that he was fired.

As Dr. Shvil recounts in his report, both the police and an ambulance arrived at the scene shortly thereafter. Perlson denied his actions and told Diaz he could return to work. Diaz was taken to the hospital and discharged later that day, "apparently having treated for minor burns." On the following day, Diaz returned to work, although he was in pain from the burn. He was told to leave immediately, as he had been fired. As Dr. Shvil reports, Diaz told him that he felt very depressed and anxious and when he spoke with other workers they told him to be careful; that Perlson was a dangerous man and could send men to hurt him. Diaz told Dr. Shvil that, at this point, he became terrified.

Diaz then reported that on November 26, 2009, he was asked by the Union to distribute flyers to employees in front of the Carnegie facility. He agreed, and as he was standing in front of the facility, Garlasco surprised him from behind and took the flyers from him. Perlson also approached him and stated, "Did you not have enough coffee? Do you want more coffee?" Diaz went, along with an individual characterized as his brother, to the police precinct the following day and pressed charges against Perlson. According to Diaz, Perlson was then arrested.

In evaluating Diaz, Dr. Shvil conducted a clinical interview which involves observing a patient and assessing his medical condition by asking him questions pertaining to his history and behavior. Dr. Shvil also conducted a mini mental status exam (MME) which determines whether the patient has thought difficulties.

As Dr. Shvil noted, Diaz reported that on February 4, 2010, approximately 2 months after the event, Diaz began seeing Dr. Morales complaining of a constant state of fear, insomnia, and nightmares. He had stopped all social interaction, outdoor sports activities, and seeing friends. He reported approximately 3 to 4 flashbacks per week where he "feels or acts" like the event is happening over again. He may hear voices from the street, and thinks that it is Perlson asking, "Do you want more coffee? Did you not have enough coffee?" He then experiences a strong physiological reaction including sweating and a rapid heartbeat.

Diaz reported that he avoids crowds and never leaves his house alone. When riding the subway, he has to leave before his stop because constantly worries for his safety and is afraid someone will hurt him. He experiences shame for not being able to support his family and believes people perceive him as worthless and incapable.

In the course of this clinical interview, Dr. Shvil found that Diaz' history showed that he had worked consistently prior to the trauma; and his social history showed that he interacted with others by playing sports and attending social events. Dr. Shvil further noted that Diaz' work in trying to bring the Union to his work place showed him to be assertive and one who tries to fight injustice.

Dr. Shvil further found that when recounting the events of November 9 and 27, Diaz appeared anxious: his hands shook, his mouth was dry and he cried. Dr. Shvil did not find these behaviors to be exaggerated.

Shortly after these events occurred, in November 2009, Diaz began to have symptoms of PTSD which he described as intrusive memories, nightmares, and flashbacks, avoidance of places or situations that might remind him of the trauma, and feelings of shame, blame, perceiving the world as a dangerous place, isolation, hypervigilence, and sleep difficulties.

In addition to the clinical interview and the MME, Dr. Shvil administered two tests to Diaz. The first of these was the Clinician Administered PTDS Scale for the DSM IV (the CAPS). This was described by Dr. Shvil as a structured interview wherein the clinician asks the patients questions which are based upon the criteria set forth in the DSM IV.[9] Dr. Shvil characterized the CAPS as the most reliable and validated tool for assessing PTSD in use today, and referred to it as the clinical and research community's "gold standard." He noted that in recent years no well-regarded journal has published any article researching the PTSD population that does not use the CAPS.

The second test Dr. Shvil administered to Diaz was the Structured Clinical Interview for DSM IV Axis I Disorders (the SCID). Similar to the procedure followed with the CAPS, the clinician reads the patient questions in the SCID and asks follow up questions as necessary to assist the clinician in determining whether the symptoms that the patient endorses is related to the trauma suspected of causing PTSD (or other disorders characterized in the DSM as falling within the ambit of Axis I).

Dr. Shvil testified that professionals in the field find the SCID to be a reliable and validated instrument to assist in determining whether someone suffers from disorders in addition to PTSD, or whether other disorders preexisted prior to the trauma.

*Dr. Shvil's Report, Diagnosis and Opinion*

Based upon the clinical interview and the CAPS, and applying the DSM 5 criteria, as set forth above, Dr. Shvil determined with a reasonable degree of psychological certainty that Diaz suffers from PTSD. He found that Diaz had suffered a direct physical attack accompanied by the perceived threat of serious injury to his eye. Diaz' symptoms have persisted for the past 3 years and cause him significant social and vocational impairment. Dr. Shvil's findings are substantiated by the result of the CAPS which show extreme PTSD symptom severity. He further concluded, based upon the clinical interview and the SCID, that Diaz additionally suffers from MDD. In this latter condition, the sufferer manifests feelings of sadness, helplessness and worthlessness, lack of motivation, and anhedonia. As Diaz reported to Dr. Shvil, more days than not, he had feelings of worthlessness and shame, had problems sleeping, lacked energy, and

[9] The CAPS uses questions relative to the DSM IV, rather than the relatively new DSM 5 which has supplanted it. A new test using the more recent criteria is still in the process of being tested for reliability.

felt that life was not worth it. Dr. Shvil determined that the SCID ruled out all Axis I disorders other than PTSD and MDD.

Dr. Shvil further testified that he concluded, to a reasonable degree of psychological certainty, that Diaz's PTSD was related to the events of November 7, 2009, and his MDD was related to the PTSD. In particular, the November 7 incident was the cause of the PTSD and began becoming evident after the threat issued by Perlson on November 27. By way of example, Dr. Shvil referred to a soldier traumatized during deployment in a gunfight who saw people dying or wounded. Although this soldier may initially have some symptoms of PTSD such as nightmares and difficulty in sleeping, he will continue to function until he returns to the United States and hears a door slam and an ambulance approaching. According to Dr. Shvil, it was in that way that the threats issued on November 27 incident, which related to the November 7 event, triggered the trauma.

Dr. Shvil further testified that he had determined, to a reasonable degree of psychological certainty, that Diaz was unable to return to work and keep a job at the current time due to his diminished level of social, emotional and vocational functioning. He has trouble interacting with others, leaving the house alone and taking the train. He has trouble concentrating and would constantly be bombarded by memories of the trauma.

*Respondent's contentions regarding Dr. Shvil's testimony and opinion*

In challenging Dr. Shvil's testimony and opinion, Respondent relies upon the fact that Dr. Shvil did not consider relevant aspects of Diaz' premorbid work and social history – in particular, the work-related difficulties he experienced between August and October 2009 where he was involved in altercations with several coworkers. Respondent further notes that the hypotheticals cited by Dr. Shvil in his testimony relate to traumatic events which do not include an example of someone who had coffee splashed in his face. Rather, the examples offered by Dr. Shvil were far more extreme in nature such as "a soldier in an ambush and instantaneously getting attacked by an enemy," "a car accident," "someone in a captivity situation and he knows that some is going to kill him or torture him," "policemen or people who need to be working in high stress or potentially traumatic situations are trained not to emotionally react to trauma. . . experience horrendous events, events that by all means are life threating or serious injury [and suffer from PTSD]," "a victim of rape" and "horrible rape, with multiple guys—sometime family members."

Respondent also points to the fact that the General Counsel offered into evidence a blank version of the SCID, rather than the once actually completed during Diaz' interview (which was entered into evidence by the Respondent) and contends further that the responses Diaz gave Dr. Shvil were inconsistent with his testimony regarding Diaz' psychiatric condition. For example, when shown the copy of the SCID that Dr. Shvil had actually completed, he reported (as a response to Question 6) that Diaz stated that he was not afraid to do things like "speaking, eating or writing in front of others." For Question 7, Dr. Shvil noted that Diaz reported that there were not other things that he was "especially afraid of." For Question 8, Dr. Shvil noted that Diaz denied being "bothered by thoughts that didn't make any sense and kept coming back to [him] even when [he] tried not to have them." When asked, "[h]as it ever seemed like people were talking about you or taking special notice of you," Dr. Shvil noted that Diaz denied such feelings

or observations. For the question, was "anyone going out of their way to give you a hard time, or trying to hurt you?" Dr. Shvil noted that Diaz stated that he was not experiencing that. In addition, Diaz denied that experienced hearing voices and things that other people could not hear, or experiencing visual hallucinations. He also denied "worry[ing] a lot about bad things that might happen."

As Respondent argues, the foregoing responses refute the objective DSM IV criteria which formed the basis for Dr. Morales' diagnosis and Dr. Shvil's testing and evaluation of Diaz pursuant to the CAPS. Moreover, it is argued, Dr. Shvil's own examples of the trauma people experience who actually do suffer from PTSD are far beyond the splashing of coffee and there is no factual basis upon which to conclude that Diaz has suffered a "serious injury."

Respondent further notes that Dr. Shvil testified that he did not review the statements made by Diaz in his 2011 application for SSD in preparation of his report and that he was unaware (until he reviewed Dr. Nassar's report, as discussed below) that Diaz had returned to the Carnegie Linen facility on several occasions after his discharge.

Respondent additionally argues that Dr. Shvil provided contradictory testimony as to the cause of Diaz' PTSD, first testifying that was caused by the November 7 coffee splashing coupled with the November 27 confrontation with Perlson, and then opining that it was solely caused by the coffee splashing, and his further opinion that it was not relevant that the physical symptoms of this event were not serious.

Respondent further contends that Dr. Shvil failed to make efforts to obtain a complete picture of Diaz and his activities both before and after the coffee incident; in particular, by not reviewing his other medical records and other documentation relating to his claims of disability. Dr. Shvil also acknowledged, as a hypothetical matter, that if he had read medical records indicating that a potential subject for his study was suspected of malingering that would have aroused suspicions.

*Dr. Nassar's report and testimony*

Dr. Nassar was qualified, as were Dr. Morales and Dr. Shvil, as an expert witness in this matter. Dr. Nassar is a medical doctor and psychiatrist, licensed since 1975. While serving in the military between 1973 and 1975, he diagnosed and treated soldiers returning from Vietnam, observing the rise in PTSD among them. Dr. Nassar has been qualified, and has testified, as an expert in various courts since the 1980's.

Dr. Nassar examined Diaz on January 7, 2015, with the benefit of an interpreter. His preparation for this examination consisted of a review of the compliance specification and answer in this matter, Diaz' medical records, his application for Social Security Disability and the reports and opinions of Dr. Morales and Dr. Shvil.

Dr. Nassar testified that the hallmark of PTSD is that there is both a serious threat to one's survival or a serious injury, but it is linked to not just the threat but also to an inability to react or a sense of helplessness in the face of that impending danger. As Dr. Nassar testified, it is that combination which overwhelms ordinary coping mechanisms.

When asked to provide examples of the types of traumatic events that he has seen to trigger the disease, Dr. Nassar referenced tortured Tibetan monks, gunshot victims; soldiers returning from Vietnam who saw people killed and had killed people themselves and soldiers returning from Afghanistan and Iraq. He also stated that he feared that the use of the term PTSD as a diagnosis was becoming overgeneralized and therefore minimizing the damage and disruption to lives that the disease causes.

When asked whether he had ever diagnosed someone with PTSD based upon circumstances similar to those at issue here, Dr. Nassar said no; nor had he ever seen such a diagnosis in published literature. However, he did note as an example where PTSD was caused when acid was thrown in the face of Afghan women.

Dr. Nassar testified that certain of Diaz' behaviors after the coffee incident (and the subsequent threat from Perlson) were inconsistent with the type of behaviors typically associated with PTSD: in particular, his return to the facility on November 27 and January 20.[10] In addition, Dr. Nassar testified that, in his opinion, the behaviors exhibited by Diaz immediately after the coffee event, such as calling the police and the Union, did not evince the requisite element of helplessness.

Dr. Nassar testified that Diaz' responses in the SSD questionnaire (set forth in part above) were more consistent with those of someone suffering from dementia or traumatic brain injury, rather than those of someone with PTSD.

Dr. Nassar additionally testified that the SCID, administered by Dr. Shvil, could not be relied upon because of its subjectivity and that the same was true for the CAPS. Generally, Dr. Nassar opined that while the CAPS is useful as a general screening tool in a clinical setting, it is inapposite in a forensic context.

In reviewing Dr. Morales' reports he found that there was no support for the conclusion that Diaz had had "boiling" liquid thrown at him or that there was a "serious injury" to Diaz' eye, as the hospital records fail to support that conclusion.

Dr. Nassar reviewed the records provided by the Segundo Ruiz Belvis clinic which, as noted above, administers general health care to Diaz. When examined on November 25, 2009, Diaz's vision was measured as 20/25 in both the left and right eyes. As Dr. Nassar testified, this is not a significant loss of vision. The examiner found that the activity muscles were normal, there had been a prior corneal abrasion but that it was superficial, had been resolved and the subjective complaints presented did not match the symptoms complained of, "no evidence of sequelae of coffee splash incident."

Diaz' vision was measured again on December 3, 2009; again found to be 20/25 in both eyes. The assessment of the optometrist was at that time that there was a subjective visual

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[10] Dr. Nassar testified that while full-blown PTSD may take some time to develop, symptoms will be experienced from the outset and develop over time.

complaint which did not match the clinical presentation. Similar observations made by another clinician were reported and made part of Diaz' medical records on March 25, 2010.

Dr. Nassar further testified that the medical records he reviewed (with the exception of the reports generated by Dr. Morales) failed to substantiate Diaz' subjective complaints in other respects. In particular, the records fail to demonstrate that Diaz was experiencing auditory hallucinations or that he was incapable of caring for himself. He was given instructions as to how to administer insulin for his diabetes; there appeared to be no difficulty with memory or concentration and he understood the medical instructions given to him.

Dr. Nassar testified that in his opinion Diaz was malingering or grossly exaggerating his symptoms. The indicators for this included: an exaggerated willingness to talk about Perlson;[11] his descriptions of dreams inconsistent with PTSD;[12] reports of hallucinations more related to a psychotic condition, without associated symptomology, as well as Diaz' gross exaggeration of symptoms including complaints of eye injury. In addition, Dr. Nassar noted Diaz' general unresponsiveness to basic questions during the clinical interview and his abrupt termination of the interview when asked to participate in a mental status examination.

*The General Counsel's challenge to Dr. Nassar's testimony*

The General Counsel challenges Dr. Nassar's testimony on several grounds. First, the General Counsel makes an attempt to minimize his professional achievements. In this regard I find that while Dr. Nassar's career arc does not mirror the academic and research focus of Dr. Shvil, he has developed a different sort of practice: one, admittedly, which involves numerous instances where he has testified as an expert witness.

To a large extent, the General Counsel relies upon supplemental testimony of Dr. Shvil to rebut Dr. Nassar's assertions. Respondent objected to the admission of this testimony, claiming that inasmuch as Dr. Shvil failed to prepare a supplemental report, such testimony did not comport with the Federal Rules and constituted undue and unfair surprise. Counsel for the General Counsel contends that it was under no obligation to provide Respondent with what is tantamount to pretrial discovery and it was within its rights to present such testimony. I allowed Dr. Shvil to testify in rebuttal to Dr. Nassar's report. Here are the points relied upon by the General Counsel:

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[11] Dr. Nassar noted in his report that Diaz immediately began to describe being followed, and he had to redirect the initial part of the examination to obtain basic information, such as Diaz' address. Throughout the examination, Diaz would often not respond directly to questions but "would revert back to his fears of Gary Perlson and his need to be protected by his wife or others."

[12] As Dr. Nassar, testified, after an initial period where a recreation of the trauma may be experienced in dreams, as time goes on, PTSD dreams consist of two elements: emotional danger and helplessness, but sufferers do not have literal, factual recreations of the events which caused the trauma.

Dr. Shvil testified that Dr. Nassar's opinion that Diaz' actions after the coffee splashing did not indicate that he was suffering from PTSD is incorrect because one cannot break down a traumatic events into parts: the trauma consisted of Respondent's owner accusing Diaz of hurting the company, demeaning him with gross language, throwing coffee at him in the presence of two managers and then firing him.

With regard to the severity threat, General Counsel contends that the issue of perception was not addressed by Dr. Nassar. As the General Counsel argues, both Dr. Shvil and Dr. Morales testified generally that the most important thing in assessing a patient is the context of the event, and the clinician's determination of how the patient perceived it, not the physical symptoms resulting from the event, which may be registered in the memory as traumatic even if it turns out there is no serious injury. Further, there is no correlation between the level of trauma and the severity of symptoms.[13]

General Counsel argues that Dr. Nassar's assertion that to have PTSD one must feel helplessness is illogical as many people with PTSD do not feel impending danger prior to the treat.

Dr. Shvil testified that a finding of helplessness is not necessary when diagnosing PTSD. When confronted with an abstract he authored endorsing a position that the trauma induced a response of fear, horror, and helplessness, Dr. Shvil responded that this article was based upon the DSM IV, not the DSM 5 which omitted a response of intense fear, helplessness or horror as a criterion for diagnosis.[14] In this regard Dr. Shvil offered testimony, which I can only regard as speculative, that Diaz might well have felt helpless because he couldn't defend himself in the situation at the time.

General Counsel points to the fact that Dr. Nassar takes issue with the diagnostic criteria as set forth in the DSM as most of the criteria are subjective. However, many of the symptoms which Dr. Nassar finds to evidence PTSD (such as hyperarousal dreams, intrusive thoughts, flashbacks, withdrawal, and decreased expression of feelings) may be diagnosed by subjective reports of the patient. Dr. Nassar acknowledged that Diaz told him that he has problems going to sleep, he often dreams of Perlson screaming and throwing coffee and saying he wants to kill Diaz. Dr. Nassar testified that that PTSD dreams area not merely a repetition of the event; it is the emotional danger and feeling of helplessness which are relived in the dream that are of

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[13] I this regard, I note that in commentary distinguishing diagnostic criteria between the DSM IV and the DSM 5 the American Psychiatric Association has stated, in pertinent part: "DSM 5 criteria for posttraumatic stress disorder differ significantly from those in DSM-IV. As described previously [for acute stress disorder], the stressor criterion (Criterion A) is more explicit with regard to how an individual experienced "traumatic" events. Also Criterion A2 (subjective reaction) has been eliminated."

[14] Of course, this argument conveniently ignores the fact that the CAPS administered to Diaz upon which Dr. Shvil largely based his diagnosis and prognosis was developed pursuant to the DSM IV. In this regard, Dr. Shvil's testimony reflects the differentiation regarding subjective perception between the DSM IV and the DSM 5 which has been noted above.

significance. Dr. Shvil stated that as long as the dreams relate to the event in some way, including replaying it, they will be PTSD dreams.

General Counsel further argues that Dr. Nassar ignored Diaz' self-reporting that he avoids talking to friends because they will inquire about the incident, even though he testified that a person with PTSD will avoid anything that will remind them of the event. Dr. Shvil stated that anything could remind Diaz of Perlson and his disability because his world becomes very small as he attempts to avoid reminders of the trauma. Similarly, General Counsel argues that Dr. Nassar discounted reports that Diaz hears menacing voices which he relates to Perlson even though they were reported to him, as were Diaz's reports of hypervigilence.

In sum, counsel for the General Counsel contends that Dr. Nassar is an outlier in the field of PTSD: based upon his experiences working with people who have experienced horrible trauma, he is unable to acknowledge when a lesser trauma is found to cause the disorder.

*Analysis and Conclusions*

In support of its contention that Diaz is entitled to be eligible for continuing backpay from the date of his discharge until he recovers from his psychiatric illnesses and is able to return to work or is eligible for full retirement under Social Security regulations, counsel for the General Counsel avers in paragraph 15 of its compliance specification as follows:

> (15) To ensure proper monitoring of Respondent's ongoing obligation to make Diaz whole, each year by January 5, the Region will:
>
> (1) Contact Diaz to obtain evidence reflecting his disability status and whether he has incurred any medical expenses.
>
> (2) Contact Respondent to obtain evidence reflecting hourly wages for the position of pressers/loaders and any changes in the medical reimbursement to which they are entitled.
>
> (3) Based on information obtained from Diaz and Respondent, adjustments to the quarterly amounts owed to Diaz will be made by the Region if appropriate.
>
> (4) Notify Respondent by the last day of each calendar quarter what the amount of backpay, medical reimbursements, and interest is for that quarter.
>
> (5) Notify Diaz to contact the Region immediately should he become eligible to return to his former position at Respondent.

The compliance officer who testified at the hearing offered no testimony or other evidence to demonstrate, explain or otherwise substantiate the assertions made above, and the General Counsel has failed to do so otherwise, as well.

In my view, the assertion that Respondent has an ongoing obligation for backpay for decades to come, and the vague efforts committed to by the General Counsel, as described above, without any definitive testimony in this regard, raise substantial due process considerations. It appears from the forgoing, that the General Counsel plans, on an annual

basis (assuming that they do so, for who is actually to monitor whether that happens or gets absorbed and forgotten in the administrative day-to-day shuffle) to conduct an exclusively ex – parte examination of whether Diaz is disabled and therefore entitled to continuing backpay payments. In the interim, compliance officers, regional directors and attorneys and general counsels may (and probably will) come and go and the utilization of administrative resources may well be reconfigured. While this may seem unduly speculative, so too is the General Counsel's assertion of continued monitoring of Respondent's continuing obligation in this matter.

Further, the General Counsel has failed to prove (as they are obliged to do, as it is asserted as a part of their ongoing obligation) what methods they would use to determine whether Diaz remains disabled and unable to work. Is the General Counsel planning to depose Diaz, take affidavits from him and other witnesses, employ medical experts or simply ask Diaz how he is feeling? There is no apparent effort to determine whether Diaz should or will seek mitigation of Respondent's backpay obligation. In this regard, it should be noted that under Social Security regulations, it is contemplated that an individual receiving disability payments may well be able to engage in work activities, they can engage in work activities without forfeiting their rights to disability payments and there are programs to assist them to do so. For example, there is a trial work period where individuals may test their ability to work for a 9-month period and still be considered disabled. See CFR 404.1592. In addition, any individual who receives Social Security benefits may earn up to a certain amount without disqualification for such benefits. In calendar years 2010 and 2011 this was $1000 per month, and this amount has increased in years thereafter.

Moreover, the General Counsel has failed to explain what opportunity might be afforded to the Respondent to counter any such adverse determination by the Region. None is even suggested. Were I to find, after the fully litigated proceeding here, that the evidence establishes that Diaz's inability to work was caused by the unfair labor practices of his employer, how long in the future could this finding be reliable and supportable? In this regard I note that Dr. Shvil, the expert that General Counsel relies upon most heavily, has opined only that Diaz is "currently" disabled and unable to work. His opinion, therefore, does not suggest a future prognosis, or the possibility of recovery which presumably one would strive for under such circumstances, if they are genuine.

Section 10(c) of the National Labor Relations Act charges the National Labor Relations Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the [Act's] policies" when an employer engages in an unfair labor practice. In order to "effectuate the policies" of the Act, the Board "must tailor the remedies to the violations in each case" and strive to "reaffirm to employees their Section 7 rights and to reassure them that the Respondents will respect those rights in the future." *Pacific Beach Hotel,* 361 NLRB No. 65 (2014).

In this instance, the General Counsel is contending that an award of continuing backpay is not a request for front pay, but for purposes of analyzing the appropriateness of such a remedy, I find the principles enunciated in the area of front pay, insofar as they have been

articulated by other administrative agencies and the courts in enforcing such orders to be instructive.[15]

Although "the Board has never awarded front pay in lieu of reinstatement to a victim of unlawful discrimination under the Act, nor has it addressed its statutory authority to do so," *Pacific Beach Hotel* supra*,* slip op. at 10, the Board has acknowledged that Title VII of the Civil Rights Act of 1964, which has remedial provisions based on the National Labor Relations Act's own remedial provisions, recognizes front pay as a viable remedy. Therefore, given the Board's guidance on this issue, I find it appropriate to consider relevant precedent arising under other statutory authority to see what ongoing monetary obligations are considered under such schemes.

The Supreme Court defines front pay as "money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement," *Pollard v. E.I. du Pont de Nemours & Co.*, supra at 846 (2001), and has been recognized by federal courts and administrative agencies as a remedy for employment discrimination. *Pacific Beach Hotel*, supra. In *Pollard,* supra, the U.S. Supreme Court determined that front pay is separate from "compensatory damages within the meaning of § 1981a, and. . . that the statutory cap of § 1981a (b)(3) is inapplicable to front pay." Id*.* at 848. Additionally, the Court recognized two scenarios where, in lieu of reinstatement, front pay may be an appropriate remedy for employment discrimination claims brought under Title VII of the Civil Rights Act of 1964. Id. at 846. For example, "when an appropriate position for the plaintiff is not immediately available without displacing an incumbent employee, courts have ordered reinstatement upon the opening of such a position and have ordered front pay to be paid until reinstatement occurs." Ibid*.* Secondly, under circumstances where "reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries suffered by the plaintiff as a result of the discrimination, the courts have ordered front

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[15] In *Pacific Beach Hotel*, the discriminatee had twice been unlawfully terminated by the respondent. This conduct raised a "serious question as to whether reinstatement adequately serves to make [the employee] whole" slip op. at 10. While neither the General Counsel nor the Union asked for front pay in lieu of reinstatement as a remedy for the worker, the Board discussed the issue. Citing to *Pollard v. E. I. du Pont de Nemours & Co.,* 523 U.S. 843, 848 (2001), The Board noted that the language of the NLRA, which authorizes the NLRB to issue an order "requiring such person to cease and desist from such unfair labor practice, and to *take such affirmative action including reinstatement of employees with or without back pay* . . . ," has been used to interpret the later enacted Title VII, which authorizes courts to "enjoin the respondent from engaging in such unlawful employment practice, and *order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay*" (Emphasis supplied).

The Board declined to grant front pay to the terminated employee, stating that before it would seek to employ front pay as a regular remedial action, there needed to be a better understanding as to what types of cases it will be applied to, what type of test will be used to determine whether front pay should be a remedy, and how the payment will calculated.

pay as a substitute for reinstatement." Ibid. See also *Gotthart v. National R.R. Passenger Corp.,* 191 F.3d 1148, 1156 (9th Cir. 1999); *Fitzgerald v. Sirloin Stockade, Inc.,* 624 F.2d 945, 957 (10th Cir. 1980). Also, courts have recognized front pay "when the employer has demonstrated aggressive behavior towards the former employee." *Pacific Beach Hotel*, supra.

Federal courts use front pay as a way "to make a victim of discrimination 'whole' and to restore him or her to the economic position he or she would have occupied but for the unlawful conduct of his or her employer." *Barbour v. Merrill*, 48 F.3d 1270, 1279 (D.C. Cir. 1995), cert. dismissed, 516 U.S. 1155 (1996), quoting *Green v. USX*, 843 F.2d 1511, 1531 (internal quotation marks and punctuation omitted). In order to determine the amount of front pay needed to make a party whole, the plaintiff must provide the court with "enough evidence to enable the court to make a reasonable projection of future loss of income," *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1160 (6th Cir. 1985), which includes "the amount of the proposed award, the length of time the plaintiff expects to work for the defendant, and the applicable discount rate." *McKnight v. General Motors Corp*., 973 F.2d 1366, 1372 (7th Cir. 1992), cert. denied, 507 U.S. 915 (1993). The defendant may "challenge the award's amount, length, or interest rate, or to establish as an affirmative defense that the plaintiff failed to mitigate damages." *Barbour*, 48 F.3d at 1279-80. See also, *Cassino v. Reichhold Chemicals, Inc*., 817 F.2d 1338, 1347 (9th Cir. 1987) ("[F]ront pay is intended to be temporary in nature").

Courts note that "[c]alculations of front pay cannot be totally accurate because they are prospective and necessarily speculative in nature." *Reneau v. Wayne Griffin & Sons, Inc*., 945 F.2d 869, 870 (5th Cir.1991). Calculating front pay is onerous and intricate.

> Numerous factors are relevant in assessing front pay, including life expectancy, salary and benefits at the time of termination, any potential increase through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which a plaintiff may become reemployed with reasonable efforts, and methods to discount any award to present net value.
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> *Davoll v. Webb*, 194 F.3d 1116, 1144 (10th Cir. 1999), citing *Shore*, 777 F.2d at 1160.

In *Davoll*, supra, the 10th Circuit Court of Appeals indicated that front pay must end on a specific date, Id. at 1144, citing *Carter v. Sedgwick County, Kan.*, 929 F.2d 1501, 1505 (10th Cir.1991), and should consider "a plaintiff's future in the position from which he was terminated," Id. at 1144, while representing "the individualized circumstances of the plaintiff and the employer." Ibid. Although, "the cut-off date is within the district court's discretion, that determination 'must be based on more than mere guesswork.'" Ibid. (internal quotations omitted). See also, *EEOC v. HBE Corp*., 135 F.3d 543, 555 (8th Cir. 1998) (Front pay award for Title VII race discrimination action reduced from five to one-year, because of high turnover rate for employees in discriminatees' position and five-year award was based on assumption that discriminatees would have remained in the position "two or three times as long as any of their predecessors"); *Boehm v. American Broadcasting Co., Inc*., 929 F.2d 482, 488 (9th Cir. 1991) (Six-year front pay award was longer than normal federal discrimination awards, but not so unusual as to warrant reversal).

The front pay award may be limited where it would be "unduly speculative." *Barbour*, 48 F.3d at 1280. Yet, the district court "should not refuse to award front pay merely because *some* speculation about future earnings is necessary, or because parties have introduced conflicting evidence." Ibid. In *Barbour*, above, the Court of Appeals for the District of Columbia remanded the case to the district court to determine the amount of front pay that would make the plaintiff whole. On remand, the district court awarded the plaintiff 1 year of front pay, which the Court of Appeals affirmed. *Barbour v. Merrill,* 132 F.3d 1480 (D.C. Cir. 1997). See also *McKnight v. GM*, 973 F.2d 1366, 1372 (7th Cir. 1992) ("The longer a proposed front pay period, the more speculative the damages become"); *Peyton v. DiMario*, 287 F.3d 1121, 1129–1130 (D.C. Cir. 2002) (26-years of front pay in Title VII case was "unduly speculative." Lifetime front pay is disfavored for individuals over the age of forty and an "employee's subjective intent to remain at a job until retirement, by itself," does not justify an award of front pay for the rest of their career).

In the instant case, the following factors militate against the remedy sought by the General Counsel:

The inability of the General Counsel to articulate how it will continue to appraise, as well as its apparent reliance upon, Diaz's continuing self-reporting regarding the state of his disability, which I find to be unreliable for various reasons as have been set forth above and will be discussed in further detail below;

The turnover rate in the industry generally. In this regard I note that Diaz became employed by Respondent in December 2006. As he told Dr. Shvil, at the time of his discharge he was one of the more senior employees at the facility.[16] It should be noted as well that Diaz's other employment was relatively short-term in nature;

The speculative nature of the damages due to the unprecedented length of the proposed backpay period;

The failure of any of the General Counsel's witnesses to opine on whether Diaz, with appropriate treatment, could foresee recovery from his condition and whether, given his age and overall general health, he would eventually be a candidate for another position which would serve to mitigate Respondent's backpay obligation.

Moreover, while it is a fundamental precept of Board law that Diaz is entitled to a lawful backpay remedy, under the circumstances presented herein, it is the failure of the General Counsel to consider the requirements of due process and fairness owed to the Respondent in the determination of whether Diaz remains disabled on an ongoing basis for years to come which confound this process.

In support of its contention that Respondent's backpay liability should not be tolled due to Diaz' alleged ongoing disability, the General Counsel relies, in significant measure, on two

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[16] In this regard I note that the Carnegie payroll records submitted to the General Counsel additionally reflect a high turnover rate.

Board cases dealing with the issue of continuing backpay: *Graves Trucking*, 246 NLRB 344 (1979), and *Greyhound Taxi Co., Inc.*, 274 NLRB 459 (1985). A review of the longitudinal history of these matters is instructive. In *Graves Trucking*, the respondent's agent violently choked its union shop steward and employee. Although never formally discharged, the employee in question suffered from a neck injury which, it was contended, prevented him from returning to work. In this case, which was an unfair labor practice proceeding, The Board found that the administrative law judge failed to consider whether an ongoing backpay remedy was appropriate and ordered that the employee should be awarded backpay from the period of disabling injury in order to make him whole from losses resulting from the respondent's unfair labor practices which rendered him medically unfit to perform his former or a substantially equivalent job for any employer. In so finding, the Board concluded that the relationship between the respondent's unlawful conduct and the employee's injury was "clear and direct." 344 NLRB at 345. The Board left to the compliance state of the proceeding a determination of when the backpay should be tolled; thus it never addressed this precise issue. On review, the Seventh Circuit concluded that an open-ended award of backpay to the steward assaulted by the supervisor was an abuse of discretion and the award would be limited to a two-year period. *Graves Trucking, Inc., v. NLRB*, 692 F.2d 470 (7th Cir. 1982). As the court stated:

> No case has been brought to our attention where the Board ordered backpay, as here, for as long in the future as disability would continue. An open ended award of that type goes about as far as possible in supplanting the loss of earnings portion of a tort recovery. More significantly, we think, it contemplates determination from time to time in compliance hearings of questions of the continued existence of disability and its cause and extent. Such questions may well be difficult and are outside the scope of those usually dealt with by the Board. The open-ended character of the remedy exacerbates all the problems of the limited expertise to which the Board has referred in the union violence situations.[17]

The court continued:

> We have considered the cases cited here where the Board has decided to attribute various types of disability to the unfair labor practice at issue, and to require backpay for that period. The longest cited was eleven months. We are mindful of the limitations on our function as a reviewing court, but have selected two years as the outer limits of a backpay award in this case. A two-year period would provide a substantial remedy even is Nash's disability lasted longer, but it would minimize the need of the board continuously to make the type of determinations which are intrinsic in the implementation of this remedy.

692 F.2d at 476–477.

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[17] In this regard, the court was referring to the Board's refusal to award employees backpay during disability suffered as a result of assaults by union agents, an argument raised by the respondent as to why it should not be required to assume an ongoing backpay obligation.

Counsel for the General Counsel further relies upon *Greyhound Taxi Co., Inc*., supra, a supplemental proceeding to determine the amount of backpay owed to an employee named Wakefield. In the underlying proceeding the Board found that the respondent's agents had physically assaulted Wakefield for his union activities, resulting in his constructive discharge. In addition, after the assault, Wakefield, who had sustained minor injuries in the assault, later developed what was characterized as a severe posttraumatic anxiety neurosis that required medical treatment and prevented him from working for more than 5years.[18] The administrative law judge found that Wakefield's disability resulted solely from the circumstances surrounding his attack and unlawful termination. The administrative law judge relied upon the opinions of three psychiatrists, two of whom were retained by insurance companies and whose interests were adverse to Wakefield, but testified in support of his disability, along with other evidence, and concluded that the level of traumatic anxiety which he suffered as a consequence of events surrounding his unlawful discharge rendered him disabled for employment and in need of psychotherapy and vocational rehabilitation. The judge further found that there was "absolutely no evidence" in the record to support a finding that Wakefield was malingering. 274 NLRB at 469. The administrative law judge recommended that Wakefield's backpay period be continued until the time he completed the vocational rehabilitation required as a consequence of the unlawful action respondent took against him, approximately 5 years.

The Board, in a split decision, held that Wakefield's psychological disability was a result of a preexisting mental condition and not caused by the respondent's unfair labor practices. In support of its conclusion the Board relied upon Wakefield's erratic employment history, previous psychiatric treatment and the perceived weaknesses in the testimony of a primary witness called by the General Counsel. In rejecting the administrative judge's recommendation, the Board stated:

> Under *American Mfg.* , supra, [167 NLRB 520, 522 (1967)] a respondent in a backpay proceeding meets its burden for the tolling of backpay by showing that the discriminatee was unavailable for employment. This the Respondent has shown here. At that point the burden shifted to the General Counsel to rebut his defense by showing that the unavailability was due to the Respondent's unlawful conduct. Even when such a showing is made in rebuttal, we do not know that the Board should be in the business of making open-ended awards for disability in the manner of a court in a civil tort action See *Graves Trucking, Inc. v. NLRB,* 692 F.2d 470, 476-477 (7th Cir. 1982).

On review, the 9th Circuit denied enforcement of the Board's order and remanded the matter to the Board to reassess the amount of backpay due to Wakefield. *Wakefield v. NLRB*, 779 F.2d 1437 ( 9th Cir. 1986). Accepting the remand as the law of the case, the Board adopted the administrative law judge's computation of Wakefield's backpay, and sustained the award for

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[18] The evidence in the underlying case the findings showed that Wakefield was threatened with murder and attacked by the same supervisor within a 2-month time span. 274 NLRB at 470.

the 5-year period initially recommended by the administrative law judge. *Greyhound Taxi Co*., 279 NLRB 1080 (1986).[19]

Absent some definitive Board guidance on this matter, I find the opinion of the Seventh Circuit in *Graves Trucking*, as endorsed by the Board in *Greyhound Taxi,* to be persuasive in this instance. Apart from the due process considerations discussed above, I find that the evidence adduced in the instant case militates against awarding the open-ended backpay award sought by the General Counsel. In this regard, I note that there are issues implicating Diaz's credibility which are demonstrated by the statements contained in his application for Social Security Disability benefits, attesting to a level of disability which he failed to report his psychiatrist or to other medical personnel; his confusing and contradictory testimony regarding his search for work and when that may have ceased; the objective evidence concerning his independent travel; his activities in support of the Union after his discharge; his attendance at a local gym; his responses to the SCID as given to Dr. Shvil which were inconsistent with other subjective complaints; his evasive testimony regarding what he may have told Dr. Morales and Dr. Shvil about his activities subsequent to his discharge as well as the evidence regarding such activities, as has been set forth above, and his refusal to fully cooperate with Dr. Nassar's examination. I additionally find it improbable that, if Diaz was as consumed with fears of Perlson's retaliation as he claims, he would have posed for a photograph for publication in a widely-distributed local newspaper.

After considering the matter, I find that Dr. Nassar's opinion is more reliable inasmuch as it encompasses a more complete examination of Diaz' premorbid state and his activities since the alleged trauma. Thus, I agree generally with Dr. Nassar's assessment that Diaz is exaggerating his symptoms and further conclude that there is insufficient reliable evidence of a direct causation between Respondent's unfair labor practices and whatever disabilities may be precluding Diaz from returning to gainful employment.

I further note that the Board has never endorsed a backpay award to the extent and nature of that sought by the General Counsel and the relevant authority regarding front pay awarded under other statutory schemes (as discussed above) does not either.

*The Calculation of Diaz' Backpay*

It is well established that the finding of an unfair labor practice is presumptive proof that some backpay is owed. *The Lorge School*, 355 NLRB 558, 360 (2010); *Laborers Local 158 (Worthy Bros.),* 301 NLRB 35, 36 (1991), enfd. 952 F.2d 1393 (3d Cir. 1991). The General Counsel's burden in a backpay proceeding is limited to showing the gross backpay due to each discriminatee. The General Counsel has discretion in selecting a formula that will closely approximate backpay, and may use any formula that approximates what the discriminatee

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[19] The other cases cited by the General Counsel on brief involve discrete situations involving limited backpay periods or additional compensation for employees who suffered injuries on the job which precluded their immediate return to their former, or substantially equivalent, employment.

would have earned had he or she not been discriminated against, as long as the formula is not unreasonable or arbitrary under the circumstances. *The Lorge School*, 355 NLRB at 360; *Performance Friction Corp.*, 335 NLRB 1117, 1117 (2001) (noting that where the Board is presented with conflicting backpay formulas, the Board must determine the most accurate method for determining backpay).

Once the General Counsel meets its burden of showing the gross backpay owed, the burden shifts to the respondent to establish facts that negate or mitigate its liability. *St. George Warehouse*, 351 NLRB 961, 963 (2007); *Parts Depot, Inc.*, 348 NLRB 152, 153 (2006), enfd. 260 Fed. Appx. 607 (4th Cir.2008). Any uncertainty about how much backpay should be awarded to a discriminatee should be resolved in the discriminatee's favor, and against the respondent whose violation caused the uncertainty. *The Lorge School*, 355 NLRB at 360.

In a traditional case, the full make-whole remedy in a 8(a)(3) termination case consists of reinstatement with backpay from the time of the unlawful discharge or refusal to hire until the employer extends an offer of reinstatement. In this case, as noted above, the General Counsel is seeking a different remedy which assumes that, due to the Respondent's unfair labor practices, Diaz will be unable to work for an indefinite period of time continuing into the future. The General Counsel's calculations in this regard are set forth in the Second Amended Compliance Specification (GC Exh. 42(a) and (b)).

As for the method upon which backpay was calculated, based upon the information available to her the Region 2 Compliance Officer concluded that "Formula One" from the NLRB Casehandling Manual, Compliance Proceedings, Section 10540.2, would provide a reasonable approximation of the backpay owed. Using this method, gross backpay is a projection through the backpay period of the discriminatee's average hours and/or earnings from an appropriate period prior to the unlawful action. Thus, the compliance officer fixed the start date for the backpay period based upon her review of the Board decision in the underlying case, determining that it commenced on November 7, 2009, the date of Diaz' unlawful discharge. She established the average hours of work and the regular and overtime pay rates from a review of paystubs and time cards from the period from January 2010 through November 2010. She additionally obtained copies of the applicable collective-bargaining agreements and payroll records for comparable employees and determined when there would have been an increase in Diaz' regular and overtime wages.[20] She calculated whether Diaz was entitled to certain reimbursements for medical expenses. The compliance officer then deducted from gross backpay as interim earnings, certain payments Diaz received from the Union in 2009 and 2010 and monies he received from the State of New York Workers' Compensation Board beginning in February 4, 2010.[21]

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[20] These included contractually scheduled wage increases for December 2009, July 2010, March 2012, June 2012, March 2013, July 2013, and March 2014.

[21] Although Respondent's answer disputes certain of these calculations, it failed to comply with the Board's Rules requiring that it "furnish appropriate supporting figures" to dispute wither the accuracy of the figures or the calculations upon which they are based. See Rules and Regulations Section 102.56(b) and (c). See also *Pessoa Construction Co.*, 361 NLRB No. 138 (2014).

Pursuant to the collective-bargaining agreement in effect from March 1, 2010, through February 28, 2010, employees deemed to be comparable to Diaz began receiving, in March 2010, $25 dollars per month toward the purchase of health insurance. This was in addition to the reimbursement for medical expenses as set forth in the applicable collective-bargaining agreement. Based upon this information, which the compliance officer received from Local 1964 counsel, it was assumed that Diaz would have received this additional $25 per month beginning in March 2010.

In addition, as noted above, under the collective-bargaining agreement, Diaz would have been entitled to reimbursement for medical expenses, up to the annual maximum set forth therein. Under the collective-bargaining agreement in effect from March 1, 2010, through February 28, 2013, employees were entitled to up to $500 in medical reimbursements during the 1st year of that agreement, up to $750 in medical reimbursements during the 2nd year of the agreement and up to $ 1000 in the 3rd year of the agreement. The 1 year agreement in effect from March 2013 to February 28, 2014, increases the reimbursement amount to $1500.

Based upon these contractual provisions and information provided by Diaz, some of which was reiterated in his testimony at the hearing, and medical receipts provided by Diaz with respect to certain of his expenditures, the compliance officer determined that he would be entitled to receive certain sums which are set forth in the appendix to the compliance specification by calendar quarter. There is no basis in the record to question or challenge these computations.

*The tolling of Diaz' backpay*

To be entitled to backpay, the claimant must mitigate damages by using "reasonable diligence in seeking alternative employment." *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). The alternative employment must be "substantially equivalent to the position from which [the discriminatee] was discharged and suitable to a person of [their] background and experience" *Southern Silk Mills*, 116 NLRB 769, 773 (1956). In determining the reasonableness of any individual's efforts, factors such as age, skills, qualifications, and labor conditions in the area are appropriate for consideration. *Alaska Pulp Corp*., 326 NLRB 522 (1998). The law does not require that the search be successful, only that the discriminatee put forth an honest, good-faith effort to find work. *St. George Warehouse* 353 NLRB 497, 501 (2008). The Board has allowed a discriminatee a 2-week period to begin his search for work following a discharge and, if a search for work begins within that time frame, backpay will run from the date of the discharge. *Grosvenor Resorts,* 350 NLRB 1197, 1199 (2007).

The Board has held that the receipt of unemployment compensation under the applicable eligibility rules for such benefits constitutes prima facie evidence of a reasonable search for employment. *Taylor Machine Products, Inc.*, 338 NLRB 831, 832 (2003), enfd. 98 Fed. Appx. 424 (6th Cir. 2004). Diaz testified that he applied for such benefits in the second week after his termination and that he reported his search for work to qualify for benefits. In addition the State of New York Unemployment Insurance Appeal Board found, in a decision dated May 21, 2012, that Diaz searched for work during the period dating from his discharge to February 4, 2010. Moreover, I credit Diaz' testimony regarding his search for work during this period of time which included visits to stores, supermarkets, laundries and restaurants several times per week. In this regard I note that Respondent was unable to adduce evidence to show that Diaz was either unavailable to work or willfully did not search for work during the weeks at issue between November 7, 2009, and February 4, 2010. To the extent Diaz had interim

earnings during this period; the compliance officer testified that adjustments were made accordingly. No interim earnings were reported after the first quarter of 2010. Currently Diaz' only sources of income are his Worker's Compensation and Social Security Disability benefits.

As noted above, Diaz has been receiving Workers' Compensation benefits beginning as of February 4, 2010, and such payments will continue until December 25, 2021. In the answer to the compliance specification, Respondent contends that it is entitled to an offset on any backpay liability for these payments.

Workers' Compensation benefits, to the extent they are temporary disability benefits, are considered a substitute for lost wages during the temporary disability period, and are deductible as interim earnings. A New York State Workers' Compensation Board Notice of decision dated May 2, 2014, shows it had, up until that date, designated Diaz' injury as a temporary partial disability. The compliance officer testified that she deducted the worker's compensation benefit payments received by Diaz from his gross backpay beginning in the week ending February 6, 2010. Respondent has presented no evidence, nor has it made any argument that it is entitled to any additional offset for such payments.[22]

As noted above, Diaz has been receiving Social Security Disability benefits. An award dated on or about August 1, 2011, found that Diaz was disabled as of February 4, 2010. Since August 2011, Diaz has been receiving $878 a month. Respondent in its answer to the compliance specification has asserted that it is entitled to an offset to any backpay liability for these payments. General Counsel has contended that the Board has construed such disability benefits as reparations for the injury suffered and has determined that they do not constitute interim earnings. In support of this contention, the General Counsel has relied upon *Domsey Trading Corp*., 351 NLRB 824, 832–833 (2007). A review of that case, however, shows that the issue considered there was whether the administrative law judge erred in deducting Workers' Compensation benefits from gross backpay. The Board found that he did not. Summarizing here, the Board found that the benefits received by the employee in question during the backpay period were temporary disability benefits and deductible as interim earnings. In my view, this finding does not squarely address the issue before me as regards Diaz' receipt of Social Security Disability benefits and whether they should be used to offset a respondent's backpay obligation in appropriate cases.

In *NLRB v. Gullet Gin Co*., 340 U.S. 361, 337 (1951), the Court applied the so-called "collateral source" rule to uphold the Board's refusal to deduct unemployment benefits from an employee's NLRB backpay award for an unlawful discharge. The Court held that the unemployment benefits at issue were collateral because they were not direct benefits from the employer and that they were made "to carry out a policy of social benefit betterment for the benefit of the entire state." Id. Since then, the "collateral source" rule has been applied to backpay awards arising under different statutory schemes when considering the question of whether Social Security benefits should be offset against such awards. See e.g. *Dominguez v. Tom James Co.*, 113 F.3d 1188 (11th Cir. 1997) (claim arising under the Age Discrimination in Employment Act of 1967, rejecting the claim that the plaintiff's backpay award should be reduced by the amount of Social Security benefits received after his termination). In other

[22] Diaz was initially awarded $125 per week and these payments were subsequently increased to $230 per seek pursuant to a Second Notice of Decision dated June 15, 2012. This Notice provides that the insurance carrier is to "continue" payments in this amount.

circuits, it has been held that the decision as to whether to deduct collateral source benefits from backpay is within the discretion of the district court with regards to ADEA cases.

Applying this general theory, the administrative law judge in *Greyhound Taxi*, supra at 417, found that Social Security Disability benefits should not be deducted from gross backpay.[23]

However, there is extant Board law which suggests that receipt of Social Security Disability benefits will toll backpay, thereby obviating this particular issue. In *Superior Export Co*., 299 NLRB 61, 61 fn. 2 (1990), the Board found that the discriminatee was not entitled to backpay after a certain date when he began receiving Social Security Disability benefits. In particular, the Board concluded that while the receipt of disability benefits, standing alone, was not prima facie proof that that the discriminatee was no longer in the labor market, the Board noted that the discriminatee's disabilities did not prevent him from working for other employers or preclude him from looking for another job (although the receipt of wages in excess of a certain amount would have entailed a loss of eligibility for further benefits.). The Board concluded that, absent affirmative evidence that the discriminatee continued his interim job search, it relied upon his admission that he was no longer in the job market after the date he began receiving such benefits. In *Performance Friction Corp*., 335 NLRB 1117 (2001), the Board relied upon the findings of the Social Security Administration (which were arrived at, unlike in the instant case, before an administrative law judge of that agency), that the discriminatee at issue was unable to perform his previous employment or substantially equivalent employment following a heart attack, despite his assertion that he was able to work and that he regularly sought interim employment. In that case, the Board concluded that it was not the discriminatee's receipt of benefits, standing alone, which supported its decision to toll backpay, but rather the findings of the SSA judge that he could not perform past or similar work, a finding which was uncontradicted by the record, which formed the basis for its conclusion. In *Aero Ambulance Service, Inc*., 349 NLRB 1314, 1315 (2007), a Board panel majority, contrary to the administrative law judge, found that the discriminatee's backpay period should be tolled as of the time he began receiving Social Security Disability benefits. In that case, contrary to *Greyhound Taxi*, the judge had concluded that the discriminatee's disability benefits would count as an offset to the Respondent's backpay liability. Inasmuch as the Board tolled backpay as of the date the discriminatee applied for these benefits, it never reached this issue. Moreover, then-Member Liebman's dissent did not address this specific issue either.

Inasmuch as I have determined that Diaz' backpay should be tolled as of the date he began receiving and accepting Social Security Disability benefits, as discussed below, this is not a matter which I need decide at the present time, but have included the foregoing discussion to the extent that the parties or the Board may disagree with my determination in this regard.

*The tolling of Diaz' backpay*

As noted above, for due process and evidentiary reasons I disagree with the General Counsel's contention that Diaz' backpay should continue until some indeterminate date in the future when he is deemed able to return to work or, in the alternative, reaches his statutory full

[23] Although the Board initially disagreed with the judge's findings regarding backpay liability, as discussed above, on remand the Board adopted the order of the administrative law judge. However, it did not specifically address this issue.

retirement age. The record as developed here presents several admittedly contradictory options as to when his eligibility for backpay should be tolled, as follows:

February 4, 2010: The date when Diaz first saw Dr. Morales and the date which he asserted was the onset of his disability causing him to be unable to work;

August 10, 2010: The date upon which the Region, on the basis of its investigation, initially concluded that "[o]n August 10, 2010, Mr. Diaz took no further steps to recover from is ULP related disability so that he could re-enter the labor market."[24]

November 2010: the date, as Diaz testified (on February 24, 2015), he stopped looking for work based upon the advice of his attorney;

June 21, 2011: the date upon which Diaz submitted his application for Social Security Disability benefits in which he attested that he was unable to work because, among other things (as has been set forth above), he was compelled to remain locked in his room due to fears, had lost vision in one eye and needed significant assistance with the most basic activities of daily living;

July 2011: the date, as Diaz testified (on March 30, 2015), that he stopped looking for work;

August 2011: the date upon which Diaz began receiving, and accepting, Social Security Disability Benefits.

March 26, 2013: The date of Respondent's offer of reinstatement to Diaz and providing him with a one week period within which to return to work;[25]

January 7, 2015: the date on which Dr. Nassar examined Diaz and provided medical evidence sufficient (in my view) to rebut the other evidence in the record pertaining to Diaz' psychiatric condition and the purported level of his disability. [26]

I have concluded, based upon the foregoing considerations, that the appropriate measure for the tolling of backpay is the date upon which Diaz began receiving, and accepting, Social Security Disability benefits based upon his attestation, under the penalty of perjury, to the fact that he is no longer able to work due to a variety of disabling conditions. At that time, he conclusively removed himself from the labor market, and the evidence establishes that he has remained so until the present date. See *Superior Export Co*., supra; *Performance Friction Corp*.

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[24] These comments are set forth in a letter from the Region to counsel for the Union and Respondent dated July 31, 2013. Obviously, the General Counsel has changed its position since that date.

[25] Diaz responded on March 27, 2013, that he wished to return to work, but was currently disabled as result of injuries acquired at Respondent and wished to return to work on disability leave. On April 11, 2013, Respondent wrote that inasmuch as Diaz had not returned to work within the one week period set forth in its March 26 letter, he no longer had a right to reinstatement but that other aspects of the Board's Order had been complied with. The validity of this offer of reinstatement or the sufficiency of Diaz's response was not litigated herein.

[26] Selecting this latter date would require an evaluation of whether Diaz' Social Security Disability benefits would offset Respondent's backpay obligation.

supra at 1119–1120.[27] Accordingly, the backpay period shall run from the date of Diaz's discharge until the week ending July 30, 2011, after which time he commenced receiving Social Security Disability benefits. In calculating the amount of Diaz' backpay for this period of time, I concur with the assumptions and computations set forth in the General Counsel's amended compliance specification and the appendix thereto.

On these findings facts and conclusions of law, and on the entire record, I issue the following recommended[28]

ORDER

Carnegie Linen Services, Inc., its representatives, successors or assigns shall:

Make Payment to Jose Luis Diaz the sum of $37,466 plus interest, less tax withholdings required by Federal and State Laws. The Respondent will also reimburse Diaz for any adverse tax consequences or liabilities which may arise from this lump sum payment.

Dated, Washington, D.C. December 29, 2015

Mindy E. Landow
Administrative Law Judge

[27] Admittedly, there is ambiguity in the record as to when Diaz actually removed himself from the labor market. In this regard, I note that Board law is clear that such ambiguities with regard to such affirmative defenses are to be construed against the respondent, as the wrongdoer. *Pessoa Construction Co*., 361 NLRB slip op. at 11; *Performance Friction Corp*., supra at 1131.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.